

Date: June 5, 1997

Case No.: 95-INA-361

In the Matter of:

ALHAR INC./ARCO AM-PM,
Employer

On Behalf Of:

BERGE ZOBAYAN,
Alien

Appearance: Eliezer Kapuya, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 12, 1993, Alhar Inc./Arco AM-PM ("Employer") filed an application for labor certification to enable Berge Zobayan ("Alien") to fill the position of Manager (AF 13-14). The job duties for the position are:

Will manage the gas station and convinient [sic] store. Will order stock and maintain store and station inventory. Will supervise ordering and sales of gas, oil and automotive products. Will maintain store records.

The requirements for the position are two years of experience in the job offered or two years of experience as a Cashier/Salesman.

The CO issued a Notice of Findings on August 25, 1994 (AF 9-11). The CO proposed to deny labor certification on two grounds. First, the CO found that the Employer rejected several applicants for lack of knowledge of gas variations. However, this requirement was not listed on the Employer's application. Therefore, the CO found that these applicants were rejected for other than lawful, job-related reasons. Second, the CO found that the Employer failed to engage in a good-faith recruitment effort.

Accordingly, the Employer was notified that it had until September 29, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated September 29, 1994 (AF 4-6), the Employer stated that only one applicant was rejected for his lack of knowledge of gas variations. The Employer argued that, in order to fulfill one of the listed job duties, ordering the gas, applicants must have knowledge of gas variations. Furthermore, the Employer argued that it could not verify this applicant's reference. The Employer also stated that it engaged in a good-faith recruitment effort. He explained that he contacted the applicants by mail in a timely fashion and followed up with a telephone call to those applicants who did not respond to the letter.

The CO issued the Final Determination on October 27, 1994 (AF 2-3), denying certification on two grounds. First, the CO found that the Employer did not reject applicant Brown for valid, job-related reasons. Second, the CO found that the Employer did not establish that it engaged in a good-faith recruitment effort.

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

On November 2, 1994, the Employer requested review of the Denial of Labor Certification (AF 1). In March 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”).

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) (now recodified as § 656.21(b)(5)) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of good-faith effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are “able, willing, qualified and available” to perform the work as required by § 656.1.

The CO in the instant case denied certification on two grounds. First, it found that the Employer failed to establish that he rejected a potentially qualified U.S. applicant for lawful, job-related reasons. Second, the CO found that the Employer did not engage in a good-faith recruitment effort. We will first discuss the Employer’s rejection of Applicant Brown. The Employer requires two years of experience in the job offered or two years of experience as a Cashier/Salesman. Mr. Brown stated that he has 14 years of experience at World Oil Company as a station manager and field supervisor (AF 34).

After interviewing Mr. Brown, the Employer stated that Mr. Brown did not have any knowledge about gas variations and, thus, would not be able to perform the job of a gas station manager (AF 17). Furthermore, the Employer stated that the applicant’s reference declined to give any information regarding Mr. Brown because they do not maintain records beyond five years of employment. Therefore, the Employer concluded that Mr. Brown is not qualified and his references could not be verified. Likewise, in rebuttal the Employer again stated that the applicant did not know the difference between various types of gas and, therefore, would not be able to order the gas (AF 4-5). The Employer further stated that, “[i]t is undisputed that anyone can learn, however, this job is not and never was an entry level position. The gas variation knowledge is necessary and can easily be inferred from the title gas station manager.” Finally, the Employer noted that it could not verify any experience which would qualify the applicant for this work.

Therefore, it appears that the Employer in this case rejected Mr. Brown for two main reasons. First, the Employer repeatedly stated that the applicant’s lack of knowledge with regard to gas variations would hinder his ability to order gas. However, the Employer’s alternative experience requirement is two years of experience as a Cashier/Salesman (AF 13). We find it highly unlikely that an individual qualifying for the job opportunity with the alternative experience would have specific knowledge of gas variations. An employer cannot reject U.S. workers for lack of experience in each duty listed where it required experience in the job offered or, in the alternative, experience in a more generalized field. *Total Building Maintenance, Inc.*, 90-INA-473 (Apr. 12, 1993). Furthermore, when discussing the applicant’s alleged lack of knowledge

with regard to the gas variations, even the Employer noted that, “it is undisputed that anyone can learn . . .” As such, it most likely would not take a prohibitive amount of time to teach an individual about the difference between certain gases. Therefore, we find that this is not a valid reason for rejecting the applicant. Second, the Employer apparently rejected the applicant because it could not verify his employment experience. However, an employer may not reject an apparently qualified U.S. applicant by asserting that it was unable to verify their work histories. Rather, the employer may request verification of employment history from an applicant and may properly reject the applicant for failure to provide said verification. *Haden, Inc.*, 88-INA-199 (July 7, 1988); *Melillo Maintenance, Inc.*, 91-INA-312 (Jan. 6, 1993). In this case, there is no evidence that the Employer requested verification of employment history from Mr. Brown. As such, this is not a valid reason for rejecting an applicant.

Therefore, the Employer has not met his burden of establishing that he rejected U.S. applicants for lawful, job-related reasons. Based on the foregoing, we find it unnecessary to discuss whether the Employer engaged in a good-faith recruitment effort. Accordingly, the CO’s denial of labor certification is hereby **AFFIRMED**.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.